STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
EVAN AND HELENE PANTELOPOULOS	:	DETERMINATION DTA NO. 809013
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Years 1986, 1987 and 1988.	: :	

Petitioners Evan and Helene Pantelopoulos, 32 Cochran Hill Road, Poughkeepsie, New York 12603 filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1986, 1987 and 1988.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on June 2, 1992 at 1:15 P.M. Petitioners submitted a brief on June 26, 1992. The Division of Taxation submitted a letter brief on July 31, 1992. Petitioners submitted a letter brief in reply on August 17, 1992. Petitioners appeared by Nicholas Pantelopoulos, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Andrew J. Zalewski, Esq., of counsel).

ISSUE

Whether petitioners, owners of a "Dunkin Donuts" franchise, have established entitlement to investment tax credit under Tax Law § 606(a)(2) with respect to certain equipment used in petitioners' business to make donuts and other baked goods.

FINDINGS OF FACT

Petitioner Evan Pantelopoulos was the sole shareholder of Golden Hue Manufacturing, Inc., an S corporation.[1] On their joint New York State personal income tax returns for the years at issue petitioners Evan and Helene Pantelopoulos claimed investment tax credits in respect of the S corporation as follows:

Year		Credit Claimed
1986		$2,620.42
1987		3,895.56
1988		1,918.00
	Total	$8,433.98

On April 20, 1990,[2] the Division of Taxation ("Division") issued to petitioners a Notice of Deficiency which asserted additional personal income tax due of $8,433.98, plus interest of $1,536.35, for a total amount due of $9,970.33 for the years 1986 through 1988.

By statements of audit changes dated December 18, 1989, the Division explained that the asserted deficiency resulted from the disallowance of claimed investment tax credits. The statements advised that the basis of this disallowance was that the "principal business activity of Golden Hue Manufacturing, Inc.", petitioners' S corporation, was "the retail sale of foods and not manufacturing".

Golden Hue Manufacturing, Inc. operated a "Dunkin Donuts" franchise. The equipment upon which the credit herein was claimed was

primarily used to make donuts, but also made pastries, croissants and other baked goods. Specifically, the equipment consisted of proofers which provide humidity and temperature

[1]Although not expressly set forth in the record, it appears that petitioner made a subchapter S election pursuant to Tax Law § 660.

[2]It is noted that petitioners consented to the extension of the limitations period for 1986 to October 15, 1990.

control for the raising of dough; mixers which mix the ingredients; ovens and "fryolators" to bake and fry the ingredients; a rolling machine to shape the dough; a filling machine to fill the donuts and pastries with ingredients; and a cutting machine to cut the shape of the dough. In sum, the equipment was used to transform dough, water and other ingredients into donuts, pastries, croissants and other baked goods.

Petitioners' "Dunkin Donuts" store consisted of a sales area, which had four tables with chairs for in-store consumption. Behind the sales area was a preparation area where the equipment at issue was located and where the donuts and other baked goods were prepared. The premises also had a small storage area. Most of petitioners' sales were "to go", i.e., for off-premises consumption. The store sold donuts and other baked goods and also coffee and soft drinks. Petitioners estimated that about 95% of sales were "to go". Petitioners also estimated that, while most of their sales were made to individual customers at the store, about 10 to 20% of sales were delivered to, or picked up by, restaurants, delis and catering operations, who, in turn, made sales to customers.

CONCLUSIONS OF LAW

A. Tax Law § 606(a)(2) provides for a credit against personal income tax with respect to tangible property which meets various criteria not at issue herein and which is principally used by the taxpayer in the production of goods by, inter alia, manufacturing or processing.

B. The regulations define "principally used" as "more than 50 percent" (20 NYCRR 106.1[d][3]).

C. The investment credit language of Tax Law § 606 (providing credit under the personal income tax) is nearly identical to the investment credit language of Tax Law § 210.12 (providing credit under the corporation franchise tax), and it is appropriate to seek guidance in construing section 606 from decisions construing section 210.12. In General Mills Restaurant Group v. Chu (125 AD2d 762, 509 NYS2d 184), the Appellate Division denied the availability of the investment tax credit provided under Tax Law § 210.12 upon equipment used in the processing of food in retail restaurants. The Court (citing 1969 NY Legis Ann at 447-449, 2576-2577) recognized the purpose behind the enactment of the investment credit provisions was to "stimulate revitalization of production facilities within [New York State]", and that "the term 'processing' speaks to an industrial activity related to manufacturing" (emphasis added). The Court upheld as valid a "distinction between the supplier of products and local retailers", and concluded that "the preparation of food by a restaurant is not considered processing in an industrial sense" (id., 509 NYS2d at 186).

D. In light of the foregoing, petitioners' claim for investment tax credit must be denied. Petitioners' "Dunkin Donuts" franchise is clearly a local retail operation and the machines in question were used in the preparation of food for retail sale. Contrary to petitioners' contention, the "Dunkin Donuts" franchise was not a "mini-factory producing baked goods in bulk"; it was clearly a retail operation. Accordingly, the process of preparing donuts and other baked goods as described herein cannot be said to constitute "processing in an industrial sense". Such activities therefore do not fall within the scope of processing activities for which the investment tax credit was intended to be available (see also, Matter of JTR Specialties, State Tax Commn., March 13, 1987; Matter of A. Pavone, Inc., State Tax Commn., September 15, 1986).

E. The petition of Evan and Helene Pantelopoulos is denied and the Notice of Deficiency, dated April 30, 1990, is sustained.

DATED: Troy, New York
February 18, 1993

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE